

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 24, 1998

TO: Gerald P. Fleischut, Regional Director, Region 26

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: American River Transportation Co./Tulane Fleet, Case No. 26-CA-18662

177-8520-0800, 177-8520-1600, 177-8540-4400

This case was submitted for advice as to whether the Employer's towboat captains are statutory supervisors.

FACTS

The American River Transportation Company (the Employer) operates 30 towboats which transport freight along inland waterways in the midwest. The crew on each towboat typically consists of a captain, a pilot, a mate, a watchman, 2-3 deckhands, a chief engineer and a cook. The captain is the highest ranking official on the boat, and earns more than twice as much in salary as his mate and deck crew. The captain has around-the-clock access by computer, telephone and radio to land-based managers, who are responsible for crew assignments and personnel changes.

During the fall and winter of 1997, certain captains and pilots at the Employer and other towing companies formed a labor organization called Pilots Agree (the Union) to assert their demands for higher wages and better working conditions. At present, Pilots Agree claims to represent at least 1000 towboat captains and pilots. On April 3, 1998, captains and pilots went out on strike in support of Pilots Agree. In response, the Employer discharged numerous captains. The Union filed a Section 8 (a)(3) & (1) charge alleging, inter alia, that the captains' discharges were unlawful. [\(1\)](#)

The Employer contends that the captains are statutory supervisors. The Employer asserts that the captains have the authority to discharge and discipline employees, to effectively recommend discharge and discipline without independent investigation by the Employer, and to effectively recommend promotions. [\(2\)](#) The Employer has provided information and evidence regarding numerous instances where captains have exercised their authority in these areas. [\(3\)](#)

For example, on December 24, 1990, Captain Davis terminated deckhand Clanton for uncleanness. Davis prepared an employee counseling form on that date indicating that he dismissed Clanton. Clanton's employee record demonstrates that December 24 was his last work day and that he was discharged for cause on that date. On October 3, 1992, Captain Robinson signed an employee counseling form recommending that the Employer terminate deckhand Diamond for attitude problems. The Employer terminated Diamond on October 6, stating in his severance letter that his termination was "at the request of the Captain of the M/V Starfire." Captains have also disciplined and recommended discipline for refusing to report for duty, violating safety rules, insubordination, refusing to perform assigned work, and failing to properly perform job duties.

With regard to promotions, the Employer provided evidence demonstrating that captains have made numerous performance-based recommendations that deckhands be promoted to "experienced deckhand", that experienced deckhands be placed on the "watchman" promotion list, and that watchmen be placed on the "mate" promotion list. The Employer provided payroll data and promotion lists indicating that the captains' recommendations were followed in a timely manner. The Employer further demonstrated that it promoted individuals on the lists in order of list seniority as promotions became available.

Several discriminatee captains have acknowledged that they have the authority described by the Employer. *[FOIA Exemptions 6 and 7(c) and (d)]*

. Several captains pointed to instances where, although the Employer did not follow the captain's recommendation that an employee be discharged, the captain succeeded in having the employee transferred to another boat.

Some captains testified that land-based management has the final authority to impose discipline and to grant promotions, and that land-based management sometimes has reversed the captains' decisions or declined to follow their recommendations; other captains testified that land-based management has dictated some of their discipline decisions during pre-discipline conversations. The captains spoke in general terms regarding those instances, provided few examples to support their contentions, and did not specifically contradict the Employer's evidence that captains regularly have exercised authority to effectively recommend discipline and promotion of employees.

ACTION

Based on the totality of the record evidence, we conclude that the Employer's captains are statutory supervisors.

Section 2(11) lists supervisory powers in the disjunctive; the regular exercise of any single listed power with independent judgment is sufficient to make an individual a supervisor. ⁽⁴⁾ The party asserting supervisory status under Section 2(11) has the burden of proof. ⁽⁵⁾ In Spentonbush/Red Star Cos., ⁽⁶⁾ the Board held that the employer failed to satisfy its burden of proving that its towboat and barge captains were statutory supervisors. The Board found that the captains' authority to discharge employees for flagrant violations of common working conditions, e.g., intoxication on the job, was insufficient to demonstrate supervisory status. With regard to recommendations of discipline for non-flagrant violations, the Board found that the employer's independent investigation prior to following the captains' disciplinary recommendations substantially undercut its claim that the captains had the authority to discipline or effectively recommend discipline.

In Stokes Towing Co. ⁽⁷⁾ we relied on a similar analysis in concluding that an employer's towboat captains were not statutory supervisors. In Stokes, the captains had the authority to eject intoxicated crew members from their boats; however, there was no evidence that the captains unilaterally terminated employees for any other reason. We found that the captains' authority in this limited flagrant circumstance did not entail independent judgment since the decision to terminate was virtually automatic. Moreover, the employer did not demonstrate that it routinely accepted captains' promotion or discipline recommendations without conducting an independent investigation.

Here, in contrast to Spentonbush and Stokes, the Employer, by citing numerous examples and providing supporting documentation, has demonstrated that its captains have the authority to discharge and discipline crew members in nonflagrant circumstances, e.g., for uncleanness and for attitude problems, which requires the exercise of independent judgment. The Employer also has established that the captains effectively recommend discharge and discipline in a variety of circumstances, and effectively recommend promotions on a regular basis. The Employer's immediate processing of captain recommendations for discipline, coupled with the absence of any evidence that the Employer has conducted independent investigations before accepting the recommendations, demonstrates that the captains have the authority to effectively recommend discipline. The promotion of deckhands to the "experienced deckhand" position based solely on captain recommendations, and the placement of individuals on other promotion lists upon captain recommendation and without independent Employer observation of their suitability for promotion, demonstrates that the captains have the authority to effectively recommend promotions. ⁽⁸⁾

The captains have not effectively refuted the Employer's evidence of their supervisory authority. Indeed, in many respects, the captains corroborate the Employer's evidence. At a minimum, the captains concede that they have the authority to issue written reprimands, remove employees from the boat, and effectively recommend promotions and transfers.

Thus, for the foregoing reasons, based on the totality of the record evidence, we conclude that the Employer's captains are statutory supervisors.

B.J.K.

¹ The Union also filed charges against other industry employers. The instant memorandum addresses only the alleged supervisory status of the Employer's captains.

² The Employer also asserts that the captains have authority to adjust grievances and to assign and direct work. In view of our conclusions herein, we have found it unnecessary to consider those assertions.

³ The Employer asserts that its evidence is representative and not all-inclusive. Most of the Employer's evidence does not refer specifically to the discriminatee captains. [*FOIA Exemptions 6 and 7(c) and (d)*]

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⁴ *Chevron U.S.A.*, 309 NLRB 59, 61 (1992).

⁵ *Id.* at 62.

⁶ 319 NLRB 988 (1995), enf. den. 106 F.3d 484 (2d Cir. 1997).

⁷ Case 26-CA-18487, Advice Memorandum dated May 14, 1998.

⁸ Compare *Chevron U.S.A.*, 309 NLRB at 65-66 (captains held employees where employer failed to present evidence as to what weight, if any, it gave to captain recommendations regarding promotion and discipline and there was evidence that the employer undertook independent investigations).